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No. 87-1305

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

KOONS FORD OF ANNAPOLIS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and DISTRICT 65, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Respondents.

BRIEF OF AMICUS CURIAE CENTER ON NATIONAL LABOR POLICY, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BRIEF OF AMICUS CURIAE CENTER ON NATIONAL LABOR POLICY, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

I. INTEREST OF AMICUS

The Center on National Labor Policy, Inc. ("Center") is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitutional rights in the labor arena have been violated by powerful, organized interests such as labor unions and governmental entities.

A continuing subject of concern for the Center has been the interference with employee voting rights regularly committed by the National Labor Relations Board ("NLRB" or "Board"). The practice underlying the instant case is the issuance of a bargaining order which instructs an employer to bargain with a union even though the union is unable to demonstrate by secret ballot election that it has the support of a majority of the employees in the bargaining unit. See NLRB v. Gissell Packing Co., 395 U.S. 575 (1969). The Center believes that this administrative practice plainly destroys the voting rights of employees under sections seven and nine of the National Labor Relations Act, 29 U.S.C. §§ 157, 159. Conair Corp., 261 N.L.R.B. 1189, 1199 (1982).

Among its objectives, the Center is concerned about the adverse impact of

pressure groups on the civil rights of the public, consumers, taxpayers, and workers. In the Center's long-term representation of employee interests, it has found that private pressure groups, such as organized labor groups, have a history of significant impact on the rights of the public, consumers, taxpayers, and workers. As this Court recognized in Connell Construction Co. v. Plumbers and Steamfitters, Local No. 100, 421 U.S. 616, 625 (1975), union pressure "could result in significant adverse effects on the market and on consumers...."

The Center, as a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of private organizations such as labor unions. Briefs amicus curiae have been filed by

the Center advocating the validity of this public policy interest in other cases before the Court, including, Breen v. ILGWU, No. 83-1791; Archie E. Brown v. FEC, No. 81-1905; Larry V. Muko, Inc. v. NLRB, No. 80-1798; Donald Schriver, et al. v. Pennsylvania Building and Construction Trades Council, No. 80-1257; New York Telephone Co. v. N.Y.S. Dept. of Labor, No. 77-961.

In the instant case, the Center was contacted by employees of Koons Ford of Annapolis, Inc. ("Koons Ford" or "the employer") in March, 1987 and informed that they were being victimized by an a Board bargaining order which ordered petitioner Koons Ford to bargain with respondent-intervenor District 65, United Automobile, Aerospace and Agricultural Implement Workers of America ("District 65" or "the union"), despite the fact that the overwhelming majority of

employees in the bargaining unit are opposed to representation by District 65. Fifty-three employees of Koons Ford, of approximately 90 current employees, signed forms retaining Center attorneys as their counsel to oppose the efforts of the Board and the union in the United States Court of Appeals for the Fourth Circuit and to obtain a new secret ballot election to select a collective bargaining representative. Because these employees were concerned that their names and addresses not be revealed to the union they requested that their interests be represented to the Court through the amicus curiae brief of the Center on National Labor Policy, Inc.[1]

The accompanying argument urges this

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[1]An affidavit with respect to these matters was filed by counsel with the United States Court of Appeals contemporaneously with the Center's motion for leave to file a brief amicus curiae.

Court to grant the petition of Koons Ford, to reverse the judgment of the United States Court of Appeals for the Fourth Circuit, and remand the case back to it so that the court of appeals considers Koons Ford's petition for review under § 10(f) of the NLRA, 29 U.S.C. § 160(f), on the merits.

The parties to the instant case are primarily focusing on the important administrative and judicial review issues under the National Labor Relations Act. Equally important, however, is the underlying substantive claim made by Petitioner and dismissed by the Fourth Circuit--that enumerated public policy interests invoked by the judicially, sua sponte, may vitiate express statutory rights to associate.

The Center is deeply concerned that if this Court permits the lower federal courts to read the equitable doctrine of

unclean hands into the settlement of labor disputes, the important public interest in resolving disputes quickly and inexpensively will evaporate.

The Center on National Labor Policy can thus bring to this case a diverse perspective not presently represented. Therefore, the Center's participation will assist the Court in obtaining full consideration of the public-interest issues.

II. ISSUE PRESENTED

Whether the court of appeals erred in determining that it was free to ascertain the equitable stain of "unclean hands," from a stipulated settlement agreement made with the Board in another matter, to deny a petition for review of a bargaining order under section 10(f) of the National Labor Relations Act to review.

III. SUMMARY OF ARGUMENT

The Center on National Labor Policy is deeply concerned that the decision of the court of appeals holding it permissible to inquire into the merits of settlements stipulations with the National Labor Relations Board, outside the judicial review procedure of § 10(f) of the National Labor Relations Act, will deter the voluntary entry of these agreements. The impact on the administration of the Act will be undercut and threatened if charged parties are considered "guilty" by the federal courts because of them.

The decision also runs contrary to the express understanding of the private parties and the Board concerning the meaning of settlement. The court's decision is contrary to well-established Board caselaw.

Finally, the equitable maxim of

"unclean hands" is reserved for controversies involving the same transaction or subject matter before the court. This was not the case here. Moreover, the maxim is improperly used when it would preserve a violation of a statutory policy. Here, the issue was whether the Board properly issued a Gissell bargaining order. Sections 7 and 9 of the National Labor Relations Act expressly preserve employee freedom of association and the right to vote. The court's decision to use the maxim in these circumstances improperly impairs these important statutory interests.

IV. THE JUDICIAL IMPLICATION OF GUILT ON THE BASIS OF NLRB SETTLEMENT AGREEMENTS IS CONTRARY TO THE NLRA

Until the decision of the Fourth Circuit in the instant case, it has been well settled and black letter law that "[a] settlement agreement does not amount

to a finding or admission that [a] respondent has committed an unfair labor practice." NLRB v. Bangor Plastics, Inc., 392 F.2d 772 (6th Cir. 1967). The Fourth Circuit determined that upon a review of its own judicial record concerning Koons Ford's settlement of unfair labor practices filed between December 1985 and May 1986, "[i]t is obvious that Koons Ford cannot meet the 'clean hands' requirement as a condition for objecting to the bargaining order in this case. It would be, therefore, a waste of judicial time to remand this cause to the Board to consider the 'clean hands' issue." (A-6).[2]

As this Court noted early in the administration of the NLRA, "the Board has from the very beginning encouraged

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[2]"A" references are to the Appendix to Petition for Writ of Certiorari order filed by petitioner.

compromises and settlements. The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them." Wallace Corp. v. NLRB, 323 U.S. at 253-54 (1944). This important public policy of reaching voluntary settlements ensures efficient use of Board resources and encourages prompt adherence to the statutory procedures and protections of the Act. See U.S. Contractors v. NLRB, 697 F.2d 692 (5th Cir. 1983). Settlement agreements, however, do preclude the Board from relitigating any aspect of presettlement conduct unless subsequent events demonstrate the settlement agreement has failed to accomplish its purpose. Id.; Wallace Corp., 323 U.S. at 254 (this is fair to "all concerned").

In NLRB v. UFCW, Local 23, 108 S.Ct. 413 (1987), the Court recently determined

that informal settlements made by the Board's General Counsel are unreviewable under § 10(f) of the NLRA and the Administrative Procedure Act. In no uncertain terms, the Court determined that "judicial review through the APA of the General Counsel's settlement determinations would run directly counter to the structure of the NLRA" Id. at 425. The Court indicated that under the statutory procedure established in NLRA § 10(f), judicial review of final orders, consent decrees, or settlements could be "fairly read" into the statute.

There is a clear similarity between the Fourth Circuit's inquiry into the merits of the settlement agreement in the instant case under the auspices of the "clean hands"[3] doctrine and APA judicial

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[3] "[H]e who comes into equity must come with clean hands." Precision Instr. Mfg. Co. v. Automotive Maint. & Mech. Co., 324 U.S. 806, 814 (1945).

review of Board decisions implemented outside the statutory procedure of the NLRA. The Court reasoned that any method of judicial review outside the formal § 10(f) process must be withheld.

> Finally, APA review of these settlements would inevitably require the federal courts, in the first adjudicatory instance, to examine the merits of unfair labor practice charges. However, Congress has made plain its unequivocal desire that, absent statutory direction to the contrary, such examinations be made first by the Board, or not at all. At least in the context of this statute, we are left with no doubt that Congress intended the right of judicial review on the merits of an unfair labor practice charge to be had only through the express provisions of the NLRA.

108 S.Ct. at 426

In the present case, the matters comprising the settlement case were presented, completed, and closed by the court of appeals before its Judgment at bar was issued. Consequently, the oppor-

tunity to contest the stipulated settlement by any aggrieved person or even by the court of appeals under § 10(f), if the agreement was determined unfair or improper, had passed.

In fact, the court of appeals issued its Judgment approving the settlement stipulation after it had been informed at oral argument of the "stain" by the Board's appellate counsel.[4] The court of appeals had a clear opportunity to consolidate the cases before the same panel of judges under Fed.R.App.P. 3(b). Under the procedure of § 10(f), it was empowered to determine the merits of the underlying unfair labor practices involved in the settlement through

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[4]Oral argument in this case was held on June 3, 1987, before Circuit Judges Russell, Widener and Chief Judge Winter. (A-1). The Settlement Stipulation was approved by the identical panel of Circuit Judges three days later on August 6, 1987. (A-28).

consolidation and thereby validate any concern it had about "unclean hands." Rather than doing so, the court of appeals approved the settlement without reservation and then five months later, affirmed the order in the instant case.

Because the Board did not determine the merits of the unfair labor practice charges alleged by the charging party and expressly agreed and understood "that the Stipulation did not admit a violation of the Act," (A-13), the court of appeals' "review" of the Stipulation is contrary to the "express provisions of the NLRA" -- that all review of unfair labor practices in any case be taken under the process of § 10(f) for that case.

The Fourth Circuit's new rule of review also runs contrary to the Board's established and well-known position with regard to the expected effect given to settlement agreements. In Cambridge Taxi

Co., 260 N.L.R.B. No. 119, 109 L.R.R.M. 1241, 1242 (1982), the Board states:

> We have consistently held that a settlement agreement disposes of all issues involving presettlement conduct of the parties, unless prior violations of the Act were either unknown to the General Counsel and not readily discoverable by investigation, or specifically reserved from the settlement agreement by the mutual understanding of the parties.

In Cambridge Taxi Co., the Board granted a motion for summary judgment to the employer concerning all outstanding charges filed prior to the settlement. In E.S.I. Meats, Inc., 270 N.L.R.B. No. 212, 117 L.R.R.M. 1065, 1066 (1984), the Board again held that all presettlement conduct of a charged party are disposed of by the execution of a settlement agreement. Consequently, a settlement agreement is expected to dispose of all issues involving presettlement conduct of the parties. This understanding by all

persons in the employment community encourages the expeditious resolution of alleged labor disputes.

Amicus curiae agrees with petitioner Koons Ford that if the federal courts begin viewing these agreements, especially ones with nonadmission clauses, as evidence in which to summarily dispose of meritorious petitions for review under NLRA section 10(f) in separate cases (in both place and time), a fundamental change has occurred which will seriously undercut future incentives for conciliation.

In the instant case, the employer's objectionable activities leading to the bargaining order occurred in the Winter of 1982. Four years later, the alleged unfair labor practice activities leading to settlement with the Board (and concurred in by the union) occurred. Two years later, the Fourth Circuit linked

the two incidents together to deny petitioner Koons Ford the statutory opportunity under 29 U.S.C. § 160(f) to contest the sweeping bargaining order against it and upon its employees.

Even the Fourth Circuit notes that its "equitable" undertaking was not in the record for review before it, that the Board had not considered these interim facts previously in its Decision and Order to petitioner, and that the issue was not briefed by the parties to the § 10(f) petition for review (i.e., the Board, Koons Ford, or union). (A-6). Rather, the issue arose only by the improper reference of Board appellate counsel at oral argument. (A-6).

Even at oral argument, the court of appeals was wary of receiving the representations at such an advanced stage in the case. But, importantly and improperly, the court of appeals never

requested the formal position of all the parties concerning any effect the settlement agreement and stipulation should have, even though the employer, union, and the Board all voluntarily signed the settlement agreement and were available parties before the court who could be interrogatoried.

To prevent a grave injustice to the parties and an obvious injury to policy interests of the Act that encourage voluntary and prompt settlement of labor disputes, certiorari must be granted and the court of appeal's Order reversed.

V. THE "CLEAN HANDS" MAXIM CANNOT BE APPLIED TO MATTERS OUTSIDE THE UNIQUE CONTROVERSY AT ISSUE BETWEEN THE LITIGANTS AT BAR

The United States Court of Appeals for the Fourth Circuit, as well as the Board's appellate counsel appearing at oral argument, deemed it proper to ascertain matters outside the stipulated

record of the case and the immediate controversy before it to deny the petition for review under NLRA § 10(f), 29 U.S.C. § 160(f). However, in invoking the equitable doctrine of "unclean hands," the Fourth Circuit actually departed from the established caveat to its application, viz., that the inequitable or wrongful conduct must be related to the same transaction or the subject matter in dispute before the court. See Hoehn v. Crews, 144 F.2d 665, 672 (10th Cir. 1944), aff'd sub nom., Garber v. Crews, 324 U.S. 200 (1945); W. DeFuniak, Handbook on Modern Equity, 39 (1956).

American state and federal courts are in considerable agreement that the "unclean hands" maxim must be connected to the actual dispute before the court. Zukowski v. Dunton, 560 F.2d 30, 35 (4th Cir. 1981) (business deals between the parties involving other ventures are not

sufficiently related to deny recovery in equity); Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, 478 (9th Cir. 1969), aff'g, 304 F.Supp. 1193, 1201 (N.D. Ca. 1969). The defense "applies only with respect to the right in suit." Warner Bros., Inc. v. Gay Toys, Inc., 724 F.2d 327, 374 (2d Cir. 1983).

In Bias v. Bias, 109 W.Va. 621, 155 S.E. 898, 899 (1930), the court stated, "[i]t is settled that the bar of the unclean hands rule is raised only because of conduct connected with the particular transaction sought to have redressed." The same reason was posited in Lyman v. Lyman, 90 Conn. 399, 97 A. 312, 314 (1916), and the policy not to deny relief in equity explained:

> The familiar maxim that he who comes into equity must come with clean hands is not used to convey the idea that no person is permitted to invoke the aid

> of a court of equity whose life and conduct has not been above reproach, nor does it mean,... that a litigant to obtain relief in equity must have been without fault in all his dealings with or conduct towards the party against who the relief is asked.

Because of the nature of change in life as well as business, the maxim "only applies to the particular transaction under consideration, for the court will not go outside of the case for the purpose of examining the conduct of the complaint in other matters or questioning his general character for fair dealing." Id. Consequently, unless the person seeking equity "requires the aid of the illegal transaction to make out his case," no bar to equity is established. Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 128, 29 A. 303, 311 (1894).[5]

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[5]The complained of conduct must also involve the same parties before the court. "Relief is not to be denied (continued...)

Here, the Fourth Circuit also applied the maxim for the first time at the close of the case. The maxim, however, cannot be raised by a party for the first time in the appellate court. Mosley v. Magnolia Petroleum Co., 45 N.M. 230, 114 P.2d 740, 756 (1940). To do so, the party so charged would be itself inequitably treated, especially where the appellate record was agreed to by the parties. See Nishman v. DeMarco, 479

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[5](...continued)
because of general iniquitous conduct on the part of the complainant or because of the latter's wrongdoing in the course of a transaction between him and a third person." United Board & Carton Co. v. Britting, 61 N.J. Super. 340, 160 A.2d 660, 663 (App. Div. 1960). The Fourth Circuit noted that there was an unresolved question of fact concerning the new ownership and management of Koons Ford "for purposes of a Gissell bargaining order." (A-5 n.1). The Court did not recognize that a successor corporation is not denied equity on account of acts of its predecessor, Britting, 160 A.2d at 663, although it will be bound in matters at law by those acts. Vulcan Detinning Co. v. American Can Co., 72 N.J.Eq. 397, 67 A. 339, 341 (1907).

N.Y.S.2d 185, 468 N.E.2d 23 (1984). Yet, the Fourth Circuit and the Board's appellate counsel chose to disregard the surprise effect their post-argument action would have on petitioner and its employees, by not disclosing earlier that the case would turn on facts not in the record or previously briefed to the court.

In the case at bar, Koons Ford took steps to eradicate the existence of unproven unfair labor practices, as encouraged by the statutory policy in the National Labor Relations Act. See Wallace Corp. v. NLRB, 323 U.S. 253, 254 (1944). The court of appeals applied no credit to Koons Ford for having done so. Yet, having taken these steps, courts in equity do not thereafter punish a litigant. "While the fact that a party seeking equity does not come with clean hands deprives such party of the right to

any relief, nevertheless, if such party purges himself of former unconscionable and wrongful conduct by adequate and effective renunciation and repudiation thereof, his right to relief will be restored." Dickerson v. Murfield, 173 Or. 662, 147 P.2d 194, 197 (1944). "Thus while 'equity does not demand that its suitors shall have led blameless lives . . ., as to other matters,' it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue." Precision Instrument Mfg. Co. v. Automotive Mach. Co., 324 U.S. 806, 814 (1945) (citation omitted).

Koons Ford eradicated the alleged unlawful effects by completing the steps agreed to with the Board in the voluntary settlement agreement. As the Board's Regional Director stated in recommending approval of the agreement, "[t]he

settlement provides almost the complete relief to which the Charging Party would be entitled should a Decision and Order issue, will result in the accelerated restoration of harmony between Respondent and the Charging Party, and will conserve the resources of all parties and the Board in reviewing a transcript of in excess of 4100 pages and the preparation of briefs and decisions." (A-16).

In these circumstances, if Koons Ford's unproven "guilt" can be accepted as true for purposes of equity, Koons Ford's entry into settlement, settlement and execution thereof has removed any taint barring relief in this matter. The Board and union "expressly understood that by entering this Stipulation, Respondent does not admit it violated the National Labor Relations Act, as amended." (A-13). Neither of these two respondent parties can show that their

interests are thereby prejudiced. "Without such a showing, the doctrine of clean hands cannot be utilized to preclude relief to [plaintiffs]." Collens v. New Canaan Water Co., 155 Conn. 477, 234 A.2d 825, 833 (1967).

As this Court stated in Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387 (1944), "[t]he maxim that he who comes into equity must come with clean hands is not applied by way of punishment for an unclean litigant but 'upon considerations that make for the advancement of right and justice.'" Accordingly, "[i]t is not a rigid formula" to be applied regardless of other interests involved in the case. Id. In Yellow Cab, the Court indicated that the maxim cannot be used where the result is contrary to a statute.

In Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138 (1968), the Court enunciated its

concern that "common-law barriers to relief where a private suit serves important public purposes" should not be applied by the federal courts. Hence, injunctions in private antitrust lawsuits will not be denied to an "unclean" plaintiff because of the "overriding public policy in favor of competition." Id. at 139. Also Kiefer-Stewart Co. v. Joseph Seagram & Sons, 340 U.S. 211, 214 (1951); Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d at 852, 864 (5th Cir. 1979) (unclean hands on ground of obscenity is inadequate justification to bar relief in copyright suit).

In the instant case, invocation of the "unclean hands" maxim saddles the employees with a bargaining representative not of their choosing. This result is contrary to the express provision of NLRA section 7 guaranteeing workers the

right to choose their own representatives. Like Perma-Life Mufflers, the equitable nature of Koons Ford's petition for review should not be denied because there is an "overriding" and stated statutory interest in ensuring employee freedom of association.

The remedial interest of the Board in this case is substantially diminished by the fact of lapse of time from the incident leading to the bargaining order occurred, due to its own inaction, and the fact that in the secret ballot election conducted by the Board, the employees chose not to be organized by District 65 in a vote of 39 to 27. (A-47). There is "no evidence that unlawful campaigning regarded by the Board as sufficiently serious to warrant a bargaining order affects voting." Getman, Goldberg and Herman, Union Representation Elections: Law and

Reality, 154 (1976).

Accordingly, the injury to the private rights of third party employees not to associate with a union must not be denied by an equity court's evaluation of the stain of "unclean hands" involving their employer's conduct. The petition for writ of certiorari must be granted to prevent this irreparable harm to employee rights and to the finely tuned mechanism for review of unfair labor practices under NLRA § 10(f).

CONCLUSION

For the reasons stated above, amicus curiae Center on National Labor Policy, Inc., submits that the Court should issue the writ of certiorari to review the decision below and then remand the case to the court of appeals for a decision on the merits of the Board's underlying

bargaining order.

Respectfully submitted,

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